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IN THE

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OCTOBER TERM 1963.

No. 146

BRYAN W. NICKERSON, JR.,

Petitioner,

vs.

THE BEARFOOT SOLE CO., INC.
THE BEARFOOT AIRWAY CORP.,

Respondents.

REPLY TO RESPONDENTS' BRIEF OPPOSING CERTIORARI

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227 Filbert Ave.
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STATEMENT

Petitioner regrets that Counsel for Respondents has *continued* to argue this case in the manner of that used in the lower court for now it becomes necessary to be unethically blunt in briefing the Supreme Court on his style of writing. Counsel was probably motivated by the fact that his efforts were rewarding in the Circuit Court, but Petitioner feels secure in the knowledge that the Supreme Court will not abide this approach to arguing a case.

Petitioner is referring to Counsel's practice of delusion in lieu of objectivity in his arguments. Delusion is a harsh word, yet what else would define the practice of subtle and deliberate clouding the issues and obscuring the truth?

It appears to Petitioner, not used to reading legal briefs, that Counsel does not have an argument, therefore must create one, and a misleading style of writing is the result.

The present brief, opposing certiorari, may be viewed as an abridged example of Counsel's past style of delusion, and is replete with the type of argument Petitioner is referring to.

The following are notations on some, but are by no means all of the misleading statements, for nearly every page and paragraph contain some to a degree.

IN DIRECT REPLY TO BRIEF OPPOSING CERTIORARI

In the Statement

The Supreme Court is concerned with the *manner* in which lower courts reach an incorrect decision.

Petitioner never mentioned low income in prosecuting reissue application in the Patent Office. Reissue was obtained on the merits alone. Petitioner stands on the merits of this present case and is neither seeking nor wants preferential considerations due to low income.

Court is respectfully referred to application for extension of time—included therein is an affidavit stating that Petitioner's counsel in lower courts was retained on a contingent basis.

In Questions Presented

The majority of errors pointed out in the petition were really inaccuracies, the errors of which are fully supported by the documents and facts of record. Few of these errors were in the grey area where opinion might enter to affect broad or narrow conclusions. Therefore, contrary to Counsel's remarks, the errors cannot be interpreted to favor any party—only the truth.

In Question 2

As set forth in remarks on Question 2 of the petition, Petitioner is not questioning right of courts to question oper-

ativeness of patent. It is the Circuit Court's clear inference that production of invention by patentee as a requirement for validity, thereby conflicting with the statutes, equity, and realism, that Petitioner questions the wisdom of.

Counsel's attempt to tie in the operativeness issue with production by patentee, argued on pages 4, 5 and 6 of brief opposing certiorari, is typical of style of delusion in which Counsel for Respondents is astute.

In Question 1

Following are pertinent comments in reference to Error 2 of petition, and specifically the discrepancy in dates of first day of production of Port-A-Wall. In addition, comments in reference to Counsel's statements on page 8 of brief opposing certiorari.

That a conflict of dates exist is without question. (See petition, page 11.) This discrepancy, only recently discovered through perseverance by Petitioner, was found buried in the file wrapper of one of Barne's numerous patents.

Although having indications of a fictitious story, *e.g.*, different dates from two different sources nearly always means a fabrication, one is inclined to give the Respondents the benefit of the doubt for it was possible that a straightforward reason existed for the discrepancy. Respondents had a chance to come forward with this reason in the brief opposing certiorari. This they did not do. Rather Counsel resorted to delusion—and thereby lies the clue—for in reacting thusly they unknowingly and unretrievably revealed their true deceptive position regarding the discrepancy.

This delusion takes the following form.

Counsel's remarks on page 8 of brief opposing certiorari as related to Error 2 is an attempt to distract from real reason for establishing an early date of production of Port-A-Wall. His real reason was to establish obviousness of the invention in the Circuit Court, and this he did as follows:

Included in the record on appeal to Circuit Court was a Chronology (Appendix 135A) which was reproduced in Appellants' brief and referred to by Counsel. This chronology chart alone is ambiguous. (compare dates with scale)

Counsel also included in record, and briefed thereon, four pages of testimony by Mr. Taylor, (Appendix 32A thru 35A) an employee of Respondents. Counsel also said in brief to Circuit Court:

> "Bearfoot designed and ordered production molds before the original Nickerson Patent No. 2,691,550 issued October 12, 1954, with two claims."
>
> "Bearfoot began manufacture and sale of their side walls November 2, 1954. . . ."

Early intentions of counsel were clearly to convince Circuit Court that Respondents did not rely on teachings of patent, implying, thereby, that side wall was obvious.

Now in brief opposing certiorari Counsel states (page 9) that Circuit Court regarded these activities in relation to intervening rights under the reissue Sec. 252. Intervening rights, as set forth therein, would be extraneous matter to the Circuit Court who had found the patent invalid and not infringed.

In view of foregoing, Counsel has confirmed fabrication of production date by trying to distort true reason for establishing date in the first place. It would seem that Respondents lost their right to fair consideration from the moment they entered this false evidence. If not then, surely it was when they tried to distort its significance.

In Question 3

The analogy drawn by Counsel that the Court of Appeals agreeing with the Examiner is the same as the Supreme Court agreeing with the District Court is suggesting a situation that requires a circumstantial vacuum to be valid. But where in life do we find such a vacuum.

As *standard* Patent Office procedure, Board of Appeals *always* remands the case back to the Examiner, but in effect the Board does the allowing.

In reference to last paragraph of brief opposing certiorari, Respondents were given ample pretrial opportunity to settle this case reasonably.

Further, according to Poor's Register, the Bearfoot Sole Co. Inc., employs approximately five hundred and fifty

persons. The Bearfoot Sole and Bearfoot Airway Corp. are each rated as having assets in excess of one million dollars by the Thomas Register. (amounts over this sum not specified) Although not huge by some standards, this is hardly the picture Counsel paints of the Respondents.

It is also an odd twist of semantics to call the act of a patentee seeking relief from an infringer harassment.

ARGUMENT

In view of the foregoing, then, the Counsel for the Respondents has shown with his own hand how misleading his style of arguing this case has been. He has emphasized, thereby, the necessity for self-determination in the Courts, for without it there can be no truth and without truth there can be no justice. As long as there are lawyers who, lacking an objective case to argue, will resort to delusion, self-determination by the Courts is a prerequisite function.

It is entirely realistic at this point to suggest that Counsel's style of arguing was a major contributing factor in the Circuit Court's inaccuracies. Further proof that self-determination was lacking may be found also in the frequency with which Circuit Court *relied* on determinations of Patent Office Examiner. Circuit Court had been misled by Counsel to believe that Board of Appeals had concurred with the Examiner.

Supreme Court must look to the future in deciding issues of today. As social and technological questions become more complex, fallible judges *could* rely on *prima facie* truth. But this is obviously not the answer for attorneys and experts are not neutral. Rather, the Supreme Court in its wisdom, Petitioner feels, will choose the harder way, *i.e.*, direct that self-determination be maintained as an uncompromising method of deciding cases, thereby compelling the *best of minds* to exert great effort until there is a limit even to their human abilities. Then, and only then, *and by that road*, will the *right* solution rise up to solve the problem of adjudging the extremely complex issues of the future. Reviewing this inaccurate decision of the Circuit Court would serve notice on the community of law that the

practice of delusive arguing of a case is not favored by the courts, that *prima facie* truth is not controlling and self-determination will prevail.

This, of course, applies to factual issues, not opinions that may vary according to preconceived ideas.

CONCLUSION

For many reasons, some of which are set forth here, it is not in the best interest to the judiciary or the citizenry for *prima facie* truth to become a fixture of the judicial process.

Courts have the sympathy of the citizens in deciding complex issues but they also have their trust. Maintaining, in the judiciary, the worthiness of their trust is the best gift the Supreme Court can give the American people.

Respectfully submitted.

BRYAN W. NICKERSON, JR.

Petitioner